STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM C. WARE,

Defendant-Appellant

UNPUBLISHED
December 26, 2000

No. 218197
Wayne Circuit Court
LC No. 98-006235

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of three counts of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to four to ten years for each of the assault convictions, to be served consecutively, and two years for the felony-firearm conviction. Defendant appeals by right and we affirm.

First, defendant argues the prosecutor failed to exercise due diligence by not producing two res gestae witnesses, and that the trial court erred by not giving itself an instruction regarding the missing witnesses. We disagree. Endorsement or deletion from the prosecution's witness list is within the discretion of the trial court, reversible only for abuse. *People v Burwick*, 450 Mich 281, 290; 537 NW2d 813 (1995). An abuse of discretion is found only if an unprejudiced person, on considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Hamm*, 100 Mich App 429, 438; 298 NW2d 896 (1980).

The prosecution correctly argues that MCL 767.40a(1); MSA 28.980(1)(1), as amended, changes the duty of the prosecutor. *People v Calhoun*, 178 Mich App 517, 522; 444 NW2d 232 (1989). MCL 767.40a; MSA 28.980(1) does not impose an obligation on the prosecutor to exercise due diligence to discover and produce unknown witnesses. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). The prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide "reasonable assistance" to the defendant in locating those witnesses, should the defendant request such assistance. MCL 767.40a(5); MSA 28.980(1)(5).

Defendant requested that the prosecutor produce two witnesses to testify with regard to the chain of custody of certain spent shell casings from the scene of the shooting. However, defense counsel stipulated, in lieu of an instruction regarding the disputed witnesses, that another witness went into the property room and observed that all nine spent shells were from an AK-47 but not necessarily the same weapon. In the present case, the prosecution had no duty to present these witnesses where this stipulation was already in place.

Even if the trial court abused its discretion by not requiring the prosecutor to produce the witnesses, this error would have been harmless. An assault is an attempted battery or "an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Sykes*, 117 Mich App 117, 120; 323 NW2d 617 (1982). The prosecution did not need to prove that defendant fired the gun to prove assault with intent to commit great bodily harm.

Next, defendant argues the trial court should have given itself an instruction that it could infer that the testimony of the witnesses would have been unfavorable to the prosecution's case based on *People v Pearson*, 404 Mich 698, 722; 273 NW2d 856 (1979), and *People v Fulton*, 414 Mich 898; 323 NW2d 4 (1982), overruling and adopting the dissent of *People v Fulton*, 110 Mich App 313; 313 NW2d 107 (1981).

According to *Pearson*, *supra* at 721:

> If the question of a missing res gestae witness is raised during the course of trial, it is our opinion that the court should hold a hearing and decide first whether the witness is in fact a res gestae witness. If it is determined that the person is a res gestae witness, the court should order the prosecution to produce him or her. If the witness is not produced, then the court should hold a hearing on the issue of whether the prosecution was duly diligent in its attempts to produce the witness.

Fulton, *supra* at 110 Mich App 316 requires:

> 1. The court shall ascertain whether the claimed missing person is a res gestae witness;
>
> 2. If so, the prosecutor shall produce the witness or explain why the witness cannot be produced and why the witness was not indorsed and produced at trial;
>
> 3. If the witness is not produced, the court shall determine whether the prosecution was duly diligent in its attempts to produce the witness;
>
> 4. If a lack of due diligence is found or if the witness is produced, the court shall ascertain whether the defendant has been prejudiced by the failure to produce the witness at trial;

5. If the defendant is found to be prejudiced the court shall fashion an appropriate remedy.

However, because defendant stipulated to the treatment of this evidence, no duty existed for the prosecutor to produce the disputed witnesses; thus, it was not necessary for the trial court to determine whether the prosecutor exercised due diligence in finding the witnesses or to give itself the requested instruction. Consequently, defendant was not denied a fair trial where the trial court failed to give itself a missing witness instruction and failed to require the prosecutor to address the presumption of prejudice.

Defendant additionally argues the trial court scored the guidelines' variables based on inaccurate information. We disagree. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990); *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

The guidelines serve merely as a tool for the trial judge in the exercise of his sentencing discretion. *People v McLeod*, 143 Mich App 262, 264; 372 NW2d 526 (1985). The adoption of the sentencing guidelines by the Supreme Court did not give substantive rights to the defendant. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986).

No cognizable claim may be brought on appeal in reference to the scoring of judicial sentencing guidelines because the guidelines do not have the force of law; a claim of miscalculation is not a claim of legal error. *People v Mitchell*, 454 Mich 145, 175-176; 560 NW2d 600 (1997). However, cognizable claims may be raised on appeal where (1) a fact is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *Id*. at 177. In this case, defendant is arguing that a factual predicate is materially false for both OV 1, use of a weapon during the crime, and OV 2, physical attack or injury from the assault. The trial court noted that at least one witness testified that she saw defendant shooting. Thus, the factual predicate was neither wholly unsupported nor materially false for these variables.

All that is required is that evidence exists that is adequate to support a particular score. *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991); *People v Reddish*, 181 Mich App 625, 628; 450 NW2d 16 (1989). Consequently, the trial court did not abuse its discretion where the scoring of the guidelines was supported by evidence on the record.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy